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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *
Petitioner,

v.

AARON D. MOSLEY, BILLY J. BUTLER,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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* Pursuant to Rule 28.1, the Court is informed that Petitioner is a wholly owned subsidiary of the Southern Pacific Transportation Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

QUESTIONS PRESENTED

1. Whether there exists a constitutional right to counsel within the context of an Equal Employment Opportunity Commission fact finding conference.

2. Whether, if there does exist a constitutional right to counsel within the context of an Equal Employment Opportunity Commission fact finding conference, the scope of this right as defined by the lower court's decision improperly interferes with the Title VII settlement process.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on January 23, 1981.

OPINIONS BELOW

The opinion and judgment of the United States District Court for the Eastern District of Texas are not reported but appear in the Appendix hereto at pages A-1 - A-13. The decision of the United States Court of Appeals for the Fifth Circuit is reported at 634 F.2d 942 and appears in the Appendix at pages A-14 - A-24. The order denying

Petitioner's motions for rehearing and rehearing en banc appears in the Appendix at pages A-25 - A-26.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1981. Appendix at A-23 - A-24. Timely petions for rehearing and rehearing en banc were denied on February 24, 1981. Appendix at A-25 - A-26. This petition for certiorari was filed within 60 days of February 24, 1981. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person . . . shall . . . be deprived of life, liberty, or property without due process of law. . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

Code of Federal Regulations, Title 29:

> § 1601.15 Investigative authority
>
> . . . .
>
> (c) The Commission may require a fact-finding conference with the parties prior to a determination on a charge of discrimination. The conference is primarily an investigative forum intended to define the issues, to determine which elements are undisputed, to resolve those issues that can be resolved and to ascertain whether there is a basis for negotiated settlement of the charge.

STATEMENT OF THE CASE

Respondents, black males, were initially employed by Petitioner, an interstate railroad, in mid-1978 as trainees for the position of Brakeman/Yardman.[1] As a part of their required training, Respondents and the other members of their training class were required to pass an examination at the end of their initial 45 days of training to demonstrate that they had adequately learned the rules and procedures governing the operation of Petitioner's equipment.

After taking the examination, Respondents were informed that they had failed to achieve a passing score. As a result of their failure of the test, Respondents were terminated.

On October 17, 1978, each of the Respondents filed a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging in substance that he had been discharged because of his race. *See* Plaintiffs' Exhibits 1 and 6. These charges were handled for the EEOC by Ms. Celeste Dorsey, an Equal Employment Opportunity Specialist. Ms. Dorsey scheduled a fact finding conference to be held on December 5, 1978, in Tyler, Texas.

On December 5, 1978, Ms. Dorsey, both Respondents and their attorney, Mr. Larry Daves,[2] and Petitioner's

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1. Except where indicated, the summary of facts is taken from the Findings of Fact and Conclusions of Law made by the district court. (R. 3-13). These facts were not contested by Respondents before the court of appeals were not addressed by the opinion of the court of appeals.

2. Mr. Daves had been a specialist in the area of employment discrimination suits for 7 years. (Tr. 62). He had been representing Respondents for several months prior to the fact finding conference. (Tr. 58).

Equal Opportunity Officer, Mr. D. G. McCann, met at the United States Courthouse in Tyler for the scheduled fact finding conference. Prior to beginning the conference, however, Ms. Dorsey asked Respondents and their attorney to wait while she completed her investigation of Respondents' charges by interviewing Petitioner's representative and obtaining responses to interrogatories she had earlier submitted to Petitioner.[3]

At the conclusion of her investigatory interview, Ms. Dorsey followed the usual procedure and asked Mr. McCann whether he wished to offer settlement terms to the Respondents prior to the beginning of the formal fact finding conference procedure. After some discussion between Ms. Dorsey and Mr. McCann, Mr. McCann agreed to offer Respondents the following terms for settlement:

> (1) the elimination from Respondents' "personal records" of all documents related to the filing of Respondents' EEOC charges and any subsequent, related events;
>
> (2) the undertaking not to disclose to any of Respondents' prospective employers any personnel evaluation of Respondents or any other reference except a neutral statement of the nature and duration of their employment; and
>
> (3) an agreement to accept and consider Respondents' applications for future employment by the Petitioner.

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3. This was the only part of this conference at which Respondents and their attorney were not allowed by Ms. Dorsey to be present. (Tr. 14-15). This exclusion of Respondents and their attorney from Ms. Dorsey's interview with Petitioner's representative was in accordance with the requirements of Title VII itself, which specify that the EEOC investigation of discrimination charges shall be kept confidential. (Tr. 14). *See* 42 U.S.C. § 2000e-8(e).

After receiving Petitioner's proposed settlement terms, Ms. Dorsey discussed the terms with Respondents, both individually and together. The Respondents' attorney did not participate in these discussions as he had left to attend to another matter.[4] During the discussion concerning the proposed settlement, Respondents requested certain changes in the terms and such changes were ultimately agreed upon. During these discussions, Respondents were informed by Ms. Dorsey that, if they did not wish to accept the proposed settlement. she would reschedule the fact finding conference and they would continue with that procedure.

Ultimately, both Respondents accepted the proposed terms for settlement which Ms. Dorsey had obtained from Mr. McCann, including the changes requested by Respondents, and both Respondents executed written agreements incorporating such terms. Because a settlement was reached, the actual fact finding conference procedure never began. (Tr. 51). Following the conclusion of the meeting, Respondents accompanied Mr. McCann to his automobile, where each was given an application form pursuant to the terms of the settlement.

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4. Ms. Dorsey testified that Mr. Daves had already left when she first spoke with Respondents concerning Petitioner's settlement offer. (Tr. 17-18). Respondent Butler and Mr. Daves testified, however, that Mr. Daves was waiting with his clients in the hall when Ms. Dorsey initially invited Respondent Butler into the conference room to discuss the settlement offer. (Tr. 60, 73). Mr. Daves testified that he did not speak to Ms. Dorsey or make any effort to accompany his client; instead, he left the Courthouse. (Tr. 60, 61, 68, 69). Respondents did not elect to call Respondent Mosley to testify on this point. (Tr. 81). The court below found it unnecessary to resolve this conflict as it was able to determine that, in any event, Ms. Dorsey was unaware of the continued presence of Mr. Daves, if he was, in fact, still present.

Following their execution of their respective settlement agreements, Respondents spoke with Mr. Daves in his office. (Tr. 64). Mr. Daves, who had a contingency fee contract with the Respondents (Tr. 69), was "incensed" about the Respondents' settlements and drafted another Charge of Discrimination for each to file with the EEOC. (Tr. 65). On the following day, Respondents filed the charges prepared by Mr. Daves. *See* Plaintiffs' Exhibits 3 and 8. The second charges of both Respondents were in all respects identical to their first charges which they had settled the previous day, with the exception of a new allegation in each charge that the test they had failed had not been validated and had a racially discriminatory impact on Respondents and other Blacks. *Compare* Plaintiffs' Exhibits 1 and 6 *with* Plaintiffs' Exhibits 3 and 8. The second charges were dismissed by the EEOC on December 15, 1978, on the ground that, having settled essentially identical charges, Respondents lacked standing to pursue their second charges. *See* Plaintiffs' Exhibits 5 and 10. Right to Sue letters were issued to both Respondents on the same date, and this action was filed within the 90-day period specified by Title VII. Jurisdiction in the district court was based on 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1331.

Although the district court denied Petitioner's motion for summary judgment predicated on Respondents' settlement agreements, the court did determine in denying this motion that it would hear evidence on the question of the validity of the settlement agreements when the case came on for trial. When the case was reached for trial, the parties initially presented evidence on the question of the validity of the settlement agreements and, pursuant to Rule 42(b), Fed. R. Civ. P., the court determined that the settlement agreements were executed knowingly and

voluntarily by Respondents and that their claims under Title VII were therefore barred. Reasoning that Respondents' parallel claims under 42 U.S.C. § 1981 were also barred because of their settlements, the court dismissed Respondents' claims under both Title VII and § 1981 and entered judgment for Petitioner. From this judgment, Respondents timely prosecuted their appeal to the court of appeals.

On appeal, Respondents argued a variety of grounds upon which they sought reversal of the district court's decision upholding their settlement agreements. *Inter alia,* Respondents argued that the EEOC had utilized improper procedures, that the EEOC representative overreached Respondents, that the settlement agreements were not supported by adequate consideration, and that the district court erred in determining that the settlements had been knowingly and voluntarily executed. Although Respondents contended that they had been denied access to their counsel at the time the agreements were executed, this was not argued within the context of a claimed constitutional right to counsel. Respondents also argued that, in any event, the district court improperly dismissed their § 1981 claims because their settlement agreements did not, by their terms, obligate Respondents to refrain from suing under § 1981.

Without directly reaching the district court's detailed findings that Respondents had voluntarily and knowingly executed their settlement agreements, the court of appeals held that Respondents' right to counsel in this context was of constitutional dimension. Appendix at A-21. As applied to the facts of this case, the court determined that this right was violated by "Ms. Dorsey's decision not to honor [Respondents'] request for an opportunity to discuss the

proposed settlement with their attorney,[5] combined with her efforts to persuade the uncounseled [Respondents] to accept the settlement terms." Appendix at A-21. Because this denial of Respondents' right to counsel was determined to have vitiated the settlement agreements, the court of appeals reversed and remanded without reaching Respondents' other arguments. Appendix at A-21 - A-22.

Following the decision and judgment of the court of appeals on January 22, 1981, Petitioner filed petitions for rehearing and rehearing en banc on February 3, 1981, urging the court of appeals to reconsider the existence of a constitutional right to counsel in this context. These petitions were denied by order of the court of appeals on February 24, 1981, and Petitioner's petition for certiorari was timely filed in this court under the jurisdiction of 28 U.S.C. § 1254(1).

REASONS FOR GRANTING THE WRIT

I. The decision below conflicts with the decisions of this Court defining the scope of the right to counsel in an administrative proceeding.

By its terms, the right to counsel guaranteed by the Sixth Amendment is applicable only to criminal proceed-

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5. With respect, the court of appeals is simply wrong in describing Ms. Dorsey's actions as a decision not to honor Respondents' request to consult their attorney. As correctly described earlier in the court's opinion, what Respondents actually stated to Ms. Dorsey was their belief that "they had to have their attorney present to sign the agreement[s]" to which Ms. Dorsey truthfully responded that Respondents did not, in fact, "have to have their attorney to sign the agreement[s]." Appendix at A-18. The lower court's finding of a denial of counsel must also be viewed within the context of the fact that, as found by the district court, Respondents were told that the *only* consequence of their failure to agree to the proposed settlement would be the rescheduling of the fact finding conference. Appendix at A-5.

ings. If there exists a constitutional right to counsel within the context of an EEOC fact finding conference, therefore, it could only exist by implication under the due process clause of the Fifth Amendment. In a closely analogous context, however, this Court has defined the applicability of the due process requirements to an administrative proceeding in a manner which clearly precludes the result reached by the court below.

In *Hannah v. Lorche,* 363 U.S. 420 (1960), the question before the Court was the validity of certain procedural rules adopted by the Federal Commission on Civil Rights—a predecessor agency to the EEOC. The challenged rules were followed by the agency in hearings into allegedly discriminatory denials of voting rights. Specifically, the rules denied witnesses the right to know the nature of the charges being investigated, the right to know the identity of the persons filing the charges, and the right to cross examine other witnesses. The rules specifically limited the witness's right to counsel to advice concerning the witness's constitutional rights. *Id.* at 432 n.12.

The Court in *Hannah* initially determined affirmatively the preliminary question of whether the agency possessed authority to adopt the challenged procedures and then addressed the question of whether the procedures were consistent with the due process clause of the Fifth Amendment. *Id.* at 440. Distinguishing sharply between adjudicatory and investigatory proceedings in the administrative hearing context, the Court held that the latter proceedings do not require the due process safeguards which have been developed in the adjudicatory context.

> [W]hen governmental agencies ajudicate or make binding determinations which directly affect the legal

> rights of individuals, it is imperative that these agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used.

Id. at 442. As the agency's hearing was of an investigatory or fact finding nature rather than adjudicatory, the Court held that the procedures were not precluded by the due process clause.

This Court specifically considered the right to counsel in an investigatory proceeding in *In re Groban,* 352 U.S. 330 (1957).[6] At issue in *Groban* was the validity of an Ohio statute which specified that an Ohio State Fire Marshal could compel a witness to attend, be sworn, and testify without the assistance of counsel in an investigation into the causes of a fire. The petitioners before the Court were witnesses in such an investigatory procedure who had refused to be sworn or to testify without the assistance of counsel and were summarily jailed for contempt under another provision of the Ohio statute. The case reached the Court upon the petitioners' appeal of the denial of their application for a writ of habeas corpus. *Id.* at 331.

Petitioners' sole assertion before the Court was that the exclusion of their counsel from the investigation under the Ohio statute was prohibited by the due process clause. *Id.*

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6. Although *Groban* was technically a case under the due process clause of the Fourteenth Amendment rather than the Fifth Amendment, Petitioner would submit that this is not a significant distinction in this context.

at 332. As it would in *Hannah* three years later, the Court distinguished sharply between adjudicatory and investigatory proceedings and held that the right to counsel under the due process clause does not exist in wholly investigatory proceedings.

> A witness before a grand jury cannot insist, as a matter of constitutional right, on being represented by his counsel, *nor can a witness before other investigatory bodies.*

Id. at 333 (emphasis added; footnotes omitted). Because the Court found the Fire Marshal's proceeding to be investigatory rather than adjudicative, the denial of the petitioner's habeas petition was upheld.

The Court's decisions in *Hannah* and *Groban* established that witnesses in administrative proceedings do not possess the usual panoply of due process protections—and, in *Groban,* specifically that they do not possess a right to counsel—in an investigatory administrative proceeding. The EEOC fact finding conference at which the lower court found Respondents were denied access to counsel was clearly, as the name suggests, a purely investigatory procedure.[7] Under *Hannah* and *Groban,* Respondents clearly did not possess a constitutional right to counsel.

The lower court's finding that Respondents did have a right to counsel was based on this Court's decision in *Goldberg v. Kelly,* 397 U.S. 259 (1970). In *Goldberg,* however, the Court considered, *inter alia,* the right to

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7. The purpose of the Fact Finding Conference is to accelerate the investigation of a charge to the point that a finding on its merits can be made or to bring the charge to an equitable resolution through a written settlement agreement.
EEOC Compliance Manual § 14.2.

counsel of a welfare recipient at an *adjudicative* proceeding to determine whether the recipient's welfare benefits would be terminated. *Goldberg* clearly is not, therefore, in any way supportive of the lower court's extension of the right to counsel in this case to a purely investigatory procedure. As the decision is therefore in clear conflict with the previous decisions of this Court holding that there exists no right to counsel in this context, review by this Court is essential.

II. The decision below has determined a significant federal question involving the scope of the right to counsel in this context which has not been, but should be, settled by the Court.

If the lower court's decision that Respondents possessed a right to counsel within the context of an EEOC fact finding conference were not in conflict with previous decisions of this Court, the scope of the right to counsel in this context implicitly created by the lower court's decision clearly involves a significant federal question which should be settled by the Court. The importance of this Court's resolving this question is emphasized by the widespread impact the lower court's decision will have and the significant interest this case has attracted from both sides of the employment discrimination bar.

This Court has previously considered the question of the effect of Title VII settlement agreements and has held that such agreements are valid and preclusive of subsequent litigation if their execution by charging parties is "voluntary and knowing." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 n.15 (1974). This standard had previously been accepted by the Fifth Circuit. *Cox v.*

Allied Chem. Corp., 538 F.2d 1094, 1098 (5th Cir. 1976), *cert. denied*, 434 U.S. 1051 (1978); *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 853 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976).

In conformity to these criteria, the district court in this case made detailed findings of fact supporting its conclusion that Respondents' settlements were both voluntary and knowing:

> 9. The Court further finds by a preponderance of the evidence that Ms. Dorsey advised the Plaintiffs that the only consequence of a failure to execute the settlement agreements at the meeting on December 5 was that the fact finding conference would be rescheduled. The Court further finds that neither Ms. Dorsey nor anyone else at the December 5 meeting represented to Plaintiffs that the terms then being offered by Defendant were the best they could possibly obtain even if they chose to file suit rather than to settle their claims, and that the Plaintiffs had been advised by their attorney of the possibility of being awarded reinstatement, back pay and attorneys' fees in the event they successfully sued the Defendant. The Court finds that Plaintiffs were not misled, threatened, coerced or overreached in any respect by the EEOC or the Defendant in an attempt to obtain the Plaintiffs' agreements. The Court also finds that, at the time they agreed to the terms of and signed their respective settlement agreements, both Plaintiffs desired to obtain the undertakings offered by Defendant, including possible employment, and were willing to exchange for such benefits their own agreement to forego the possibility of a lawsuit based on their claims. For these additional reasons the Court finds by a preponderance of the evidence that each of the Plaintiffs voluntarily agreed to the terms of and executed his settlement agreement.

> 10. The Court finds by a preponderance of the evidence that, at the time they agreed to the terms of and signed their respective settlement agreements, the Plaintiffs had retained counsel and had discussed with him the possibility of settlement at the meeting on December 5, and that each of the Plaintiffs knew and understood the concept of compromise which such a settlement would involve. For these additional reasons, the Court finds by a preponderance of the evidence that the Plaintiffs knowingly and voluntarily agreed to the terms of and executed their respective settlement agreements.

As the district court's determinations in this regard were not found by the Fifth Circuit to be unsupported by the record, the circuit court's holding can only be read to mean that, notwithstanding the fact that Respondents' settlements were, as found by the district court, both voluntary and knowing, they are invalid because of the denial of Respondents' right to counsel. The effect of this decision is to add to the *Gardner-Denver* criteria of "voluntary and knowing" the additional criterion that a Title VII settlement cannot be tainted by a denial of counsel or, perhaps, by a denial of any of the due process protections which have been developed in the criminal context. This holding has, on its face, the obvious potential to accomplish a serious disruption of the EEOC efforts to persuade parties to resolve Title VII claims by settlement.

The problems which the Fifth Circuit opinion will create for employers in attempting to settle Title VII claims is well illustrated by the facts of this case. The "denial of access to counsel" found by the circuit court consisted of, first, the efforts of the EEOC representative, Ms. Dorsey, to persuade Respondents to accept Petitioner's settlement terms and, second, her "decision not

to honor [Respondents'] request for an opportunity to discuss the proposed settlement with their attorney." Appendix at A-21.

The circuit court's reasoning overlooks, initially, the fact that it was Ms. Dorsey's responsibility under the statute itself as well as EEOC regulations to persuade both parties to reach a settlement if she could. This inevitably requires persuading one or both parties to make an offer of settlement and persuading the other party to accept the offer.

The circuit court's rationale is also misleading in suggesting that Ms. Dorsey determined not to honor Respondents' request to discuss the settlement terms with their attorney. There is simply no evidence that Respondents at any point made such a request and, in fact, the district court specifically found that no such request was made. Appendix at A-5. The only remarks made by Respondents relevant to such an alleged "request" was a statement of their mistaken belief that "they had to have their attorney present to sign the agreement[s]." Appendix at A-18. The only remarks made by Ms. Dorsey relevant to any possible denial of any request by Respondents to consult their attorney was her truthful response that Respondents were not required to have their attorney present to sign the agreements. Appendix at A-18. With the utmost respect, Respondents' mistaken notion of settlement procedures and Ms. Dorsey's correction of this error is not the equivalent of a denial by Ms. Dorsey of a request by Respondents to consult their attorney.

Viewed in the context of the facts of this case, the right to counsel created by the circuit court's opinion is an extremely technical rule which will invalidate Title VII

settlements which are both voluntary and knowing if the charging party at any point prior to finally deciding to execute the agreement expresses a desire to consult his counsel or, as in this case, even expresses a mistaken belief that the presence of his attorney is required to conclude the agreement.

The record reflects without dispute that Respondents' counsel would have been welcome to attend and advise his clients but was not present to do so as he elected to leave to attend to other business prior to the settlement discussions between Ms. Dorsey, Petitioner and Respondents. The circuit court's finding of a denial of access to counsel in this context based on the conduct of Ms. Dorsey as set out above creates an impossible situation for employers. Under the circuit court's rule, an employer cannot execute a settlement agreement without undergoing the risk that, unknown to him, the efforts of the EEOC representative to persuade the parties to settle combined with the fact that the charging party has retained counsel will ultimately invalidate the agreement based on a denial of counsel even though the retained counsel is not present because of a decision to leave to attend to other business and the charging party at no point requests the opportunity to discuss the settlement with his counsel. The inevitable result of this rule will be to seriously lessen the willingness of employers to reach settlements (and tender the agreed-upon consideration) which may be unenforceable against the charging party and ineffective to preclude future litigation.

Before the Fifth Circuit, amicus briefs were submitted by the EEOC, the NAACP Legal Defense Fund, and the Equal Employment Advisory Council. As indicated by

this fact, the rule created by the circuit court has attracted significant interest from the employment discrimination bar. The scope of the right to counsel recognized by the circuit court in this case clearly constitutes a significant federal question which should be settled by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
For The Eastern District of Texas
Tyler Division

CIVIL ACTION NO. TY-79-75-CA

[Filed Mar. 28, 1980]

AARON D. MOSELY, et al.,
Plaintiff,

v.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action first came on for consideration by this Court upon Defendant's Motion for Summary Judgment, in which Defendant urged that the Plaintiffs had entered into valid and binding settlement agreements to resolve their claims of discrimination on which this action is based. Because it appeared to the Court that there might be genuine issues of fact with respect to the settlement agreements, the Court denied Defendant's Motion for Summary Judgment by its order of January 22, 1980, but informed the parties that the validity of the settlement agreements would be determined in a future hearing prior to the trial of the merits.

This action was set down for trial in due course on this Court's docket for the week of February 11, 1980. At

the Docket Call on February 11, both parties hereto announced that they were not ready to try the merits of this action but that they were ready to try the question of the validity of the settlement agreements. Accordingly, the Court informed the parties that any trial of this action on the February 11 docket would be limited to the issue of the validity of the settlement agreements.

The Court having determined, pursuant to Rule 42(b) of the Federal Rules of Civil Procedure, that a separate trial of the issue of the validity and effect of the settlement agreements would be both conducive to expedition and economy and convenient to the Court and parties, said issue was duly tried before the Court sitting without a jury, on February 15, 1980, all parties being in attendance and represented by counsel, and all parties having announced ready for trial of such issue.

Based on the evidence and arguments presented, and based upon the Court's observation of the demeanor and appearance of the witnesses and its findings as to their credibility, the Court hereby makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

1. Plaintiffs were employed by Defendant as trainees for the position of Brakeman/Yardman in mid-1978.

2. As a part of their training, Plaintiffs and the other members of their training class were informed that they would be required to pass an examination at the end of their initial 45 days of training to demonstrate that they had adequately learned Defendant's rules and procedures governing the operation of its equipment.

3. Plaintiffs were informed by Defendant after taking the examination that they had failed to achieve a passing score and were therefore being terminated as of June 4, 1978.

4. On October 17, 1978, Plaintiffs each filed a Charge of Discrimination with the Equal Employment Opportunity Commission in which each Plaintiff alleged in essentially identical language that he felt that, by being discharged, he had been discriminated against because of his race, Negro, by Defendant.

5. Pursuant to its usual procedure in these cases, the Equal Employment Opportunity Commission investigator, Ms. Celeste Dorsey, scheduled a "fact finding conference" to be held between herself, both Plaintiffs and a representative of the Defendant. As later rescheduled, this conference occurred on December 5, 1978.

6. At the conference on December 5, 1978, Plaintiffs appeared with their counsel, Mr. Larry Daves. Defendant appeared by its Equal Opportunity Officer, Mr. D. G. McCann. As her initial step at this meeting, Ms. Dorsey asked Plaintiffs and their counsel to wait while she completed her investigation of Plaintiffs' charges by interviewing Mr. McCann and obtaining from him responses to the investigatory questions she had earlier submitted to the Defendant. Following the completion of this interview, Ms. Dorsey followed the usual procedure of the EEOC at that time and asked Mr. McCann what he would be willing to offer Plaintiffs to settle their charges prior to the formal fact finding conference and any further investigation of Plaintiffs' charges by the Commission. After some discussion, Mr. McCann agreed to offer Plaintiffs the following terms for settlement: 1) the elimination

from the Plaintiffs' "personal records" of all documents relating to the filing of the Plaintiffs' EEOC charges and any subsequent, related events; 2) the undertaking not to disclose to any of Plaintiffs' prospective employers any personnel evaluation of Plaintiffs or any other reference except a neutral statement of the nature and duration of their employment; and 3) an agreement to accept and consider Plaintiffs' applications for future employment by the Defendant.

7. After this discussion with Mr. McCann, Ms. Dorsey went out into the hall and brought Plaintiff Butler into the room to discuss Defendant's settlement offer. Although Ms. Dorsey testified that Plaintiff's attorney Mr. Daves, was no longer present by this point, both Plaintiff Butler and Mr. Daves testified that Mr. Daves was waiting in the hall with the Plaintiffs. Mr. Daves further testified that Ms. Dorsey did not speak to him or invite him to participate in the discussion between Ms. Dorsey and Butler. Mr. Daves also testified, however, that he did not speak to Ms. Dorsey or attempt to participate in the conference, and that immediately thereafter he left the Courthouse to attend to a state matter. The Court does not find it necessary to resolve any apparent dispute in the evidence with respect to whether Mr. Daves was or was not with Plaintiff Butler when Ms. Dorsey asked Plaintiff Butler to discuss with her the Defendant's settlement offer. The Court is convinced and finds by a preponderance of the evidence that Ms. Dorsey was not aware of the continued availability of Plaintiffs' counsel when she spoke to Mr. Butler in the corridor and invited him to confer. Based on that finding, the fact that Plaintiffs' counsel made no objection to Ms. Dorsey's speaking alone with his client and left the building soon thereafter,

and the further fact that at no time during the subsequent events did either Plaintiff object to the absence of their counsel or ask to be allowed to discuss the proposed settlement with him, the Court finds by a preponderance of the evidence that Plaintiffs were not denied access to their counsel.

8. Ms. Dorsey discussed the proposed terms for settlement with the Plaintiffs, both separately and together. The Plaintiffs suggested certain changes which were ultimately incorporated in the terms of the agreements. Ms. Dorsey informed Plaintiffs that the terms agreed to by Defendant were the best she had been able to obtain and that, if they did not wish to accept the Defendant's terms and sign the settlement agreements incorporating such terms on that day, she would reschedule the formal fact finding conference for another day and they could continue with that procedure. Ultimately, both Plaintiffs accepted the proposed terms for settlement which Ms. Dorsey had obtained from Mr. McCann, including the changes requested by the Plaintiffs, and both Plaintiffs executed written agreements incorporating such terms. As set out in each agreement, the terms of the Plaintiff's respective settlements were as follows:

AGREEMENT

> 1. In exchange for the promise made by St. Louis Southwestern Railway, hereinafter referred to as the "Respondent," contained in this agreement, [Plaintiff] hereafter referred to as the "person claiming to be aggrieved," agrees not to institute a lawsuit under Title VII of the Civil Rights Act of 1964, as amended, based on Charge No. [each Plaintiff's respective charge number is here inserted] filed with the Equal Employment Opportunity Commission,

and the Equal Employment Opportunity Commission agrees not to process the charge further.

2. The Respondent agrees to eliminate from the personal record files of person claiming to be aggrieved all documents relating to the filing of the instant charge of discrimination and the related events which occurred thereafter.

3. The Respondent agrees that at any time any employer or prospective employer of the person claiming to be aggrieved seeks an evaluation or "reference" concerning the person claiming to be aggrieved, the Respondent will give written response and the response will be neutral, including only the nature and duration of charging party's employment.

4. The Respondent agrees to permit the Charging Party to make application and will be given careful consideration for employment.

5. It is understood that this agreement does not constitute an admission by the Respondent of any violation of Title VII of the Civil Rights Act of 1964, as amended.

6. The Equal Employment Opportunity Commission's participation in this agreement does not reflect any judgment by the Commission on the merits of the charge. Furthermore, the Equal Employment Opportunity Commission does not waive its right to process any further charge, including a charge filed by a member of the Commission against the Respondent.

9. The Court further finds by a preponderance of the evidence that Ms. Dorsey advised the Plaintiffs that the only consequence of a failure to execute the settlement aggreements at the meeting on December 5 was that the fact finding conference would be rescheduled. The Court

further finds that neither Ms. Dorsey nor anyone else at the December 5 meeting represented to Plaintiffs that the terms then being offered by Defendant were the best they could possibly obtain even if they chose to file suit rather than to settle their claims, and that the Plaintiffs had been advised by their attorney of the possibility of being awarded reinstatement, back pay and attorneys' fees in the event they successfully sued the Defendant. The Court finds that Plaintiffs were not mislead, threatened, coerced or overreached in any respect by the EEOC or the Defendant in an attempt to obtain the Plaintiffs' agreements. The Court also finds that, at the time they agreed to he terms of and signed their respective settlement agreements, both Plaintiffs desired to obtain the undertakings offered by Defendant, including possible employment, and were willing to exchange for such benefits their own agreement to forgo the possibility of a lawsuit based on their claims. For these additional reasons the Court finds by a preponderance of the evidence that each of the Plaintiffs voluntarily agreed to the terms of and executed his settlement agreement.

10. The Court finds by a preponderance of the evidence that, at the time they agreed to the terms of and signed their respective settlement agreements, the Plaintiffs had retained counsel and had discussed with him the possibility of settlement at the meeting on December 5, and that each of the Plaintiffs knew and understood the concept of compromise which such a settlement would involve. For these additional reasons, the Court finds by a preponderance of the evidence that the Plaintiffs knowingly and voluntarily agreed to the terms of and executed their respective settlement agreements.

11. Following their execution of their respective settlement agreements, Plaintiffs accompanied Mr. McCann to his car, where each was given a form for application for employment with Defendant.

12. Any finding of fact deemed to be a conclusion of law is adopted as such.

Conclusions of Law

1. The settlement agreements which the Plaintiffs signed knowingly and voluntarily are consistent with the purposes of Federal laws concerning employment discrimination and, considering all the circumstances under which they were negotiated and executed, those agreements should be enforced by this Court.

2. "Cooperation and voluntary compliance" without the necessity for a lawsuit was deliberately selected by Congress as "the preferred means" to resolve alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"). *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826, 847 (5th Cir. 1975), *cert. denied,* 425 U.S. 944 (1976); *quoting Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 44 (1974). The same policy of encouraging conciliation and informal settlements applies to the Civil Rights Act of 1866, 42 U.S.C. § 1981 ("§ 1981"), which in this respect can and should be interpreted consistently with Title VII. The EEOC is required by Title VII to "endeavor to eliminate any . . . alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion." 42 U.S.C. § 2000e-5(b). The Court is fully satisfied that, in this case, the Commission's representative properly and fairly carried out the Com-

mission's statutory duty, and that the goal of Congress was realized.

3. As the Plaintiffs each knowingly and voluntarily agreed to the terms of their respective settlement agreements, they are each bound by their agreement not to file suit against Defendant based on the charges which they filed against Defendant. The Complaint in this case is clearly based on the charges filed and ultimately settled by Plaintiffs. The Plaintiffs' allegations based on Title VII therefore must be dismissed with prejudice.

4. Literally, the settlement agreements executed by Plaintiffs obligated them not to institute a lawsuit "under Title VII . . . based on [their respective charges to the EEOC]." The allegations of Plaintiffs' Complaint are founded not only on Title VII but also on § 1981, which gives rise to a separate and independent remedy for employment discrimination. *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975). However, it is clear that Title VII and § 1981 must be harmonized and applied consistently insofar as practicable, and the Court should avoid if possible an interpretation of § 1981 which would be contrary to the purposes of Title VII. *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157 (5th Cir. 1978). Therefore, the Court concludes for the reasons which follow that the settlement agreements bar all claims based on the Defendant's alleged acts of discrimination whether founded on Title VII or § 1981.

An analagous issue was considered by the Fifth Circuit in *United States v. Allegheny-Ludlum Indus., supra,* in which the Court refused to limit the effect of certain settlements:

> [Appellants] argue that . . . a settlement of a claim in one forum or proceeding cannot be raised by the same defendant in bar to another proceeding for more back pay. They maintain that the employee's voluntary release in settlement of a claim for a disputed and concededly uncertain sum can bar the employee only from obtaining further recoveries in the *same forum* and under the *same nomenclature* as appertained to the proceeding which resulted in the compromise. . . . We reject the theory. [Emphasis the Court's; footnote omitted].

517 F.2d at 856-57.

Obviously, if settlement agreements reached through the conciliation efforts of the EEOC could be avoided by the simple expedient of suing under § 1981, no employer would have any incentive to settle claims pursuant to the fact finding, "no-fault" settlement, or other conciliation proceedings of the EEOC, and the role of the EEOC in fostering the conciliation of employment discrimination claims would be severely hampered if not effectively destroyed. Although it was speaking in a somewhat different context, the Fifth Circuit in *Allegheny-Ludlum* was clearly cognizant of the threat which would be posed if voluntary settlements were not enforced:

> In no respect does footnote 14, or anything else in *Gardner-Denver,* support the assertion that an aggrieved employee who freely settles his or her unliquidated demand with the employer or the union may reciprocate by suing the same defendant at a later date on the same cause of action, merely because the employee grows dissatisfied with the payment for which he or she settled. Very frankly, we cannot conceive of how any employment discrimination dispute could ever be resolved outside, or indeed

> inside, the courtroom, if defendants were forbidden to obtain binding, negotiated settlements. No defendant would ever deliver money, promises, or any other consideration—not even a peppercorn—except after entry of a contested, final court order, and even this, on appellants' reasoning, might not end the matter. The EEOC and judicial caseloads would swell to chaotic dimensions. Industrial peace would be needlessly threatened.

517 F.2d at 858-59.

Based on these concerns, the few courts which have considered similar issues have rejected arguments that a settlement can be avoided by merely suing under a statute not specifically referred to in the settlement agreement to recover for the same act of alleged employment discrimination. As stated by the Court in a directly analagous case, *Strozier v. General Motors,* 442 F.Supp. 475 (N.D. Ga. 1977), *appeal dismissed,* 584 F.2d 755 (5th Cir. 1978):

> Where an employee voluntarily and knowingly accepts settlement relief substantially equivalent to that obtainable under Title VII and section 1981, he has waived his right to resort to the judicial forum to obtain additional relief under Title VII and section 1981 if such additional relief is grounded upon the same alleged discriminatory conduct that forms the basis of the voluntary settlement.

Id. at 481, quoted with approval, *Lyght v. Ford Motor Co.,* 458 F.Supp. 137, 141 (E.D. Mich. 1978).

Therefore, having concluded that Plaintiffs are barred from suing under Title VII, the Court further concludes that Plaintiffs are barred by their settlement agreements

from suing under 42 U.S.C. § 1981 to recover for the same allegedly discriminatory conduct by Defendant on which their Title VII claims were founded, and that the Complaint should therefore be dismissed in its entirety.

5. The Court concludes that Plaintiffs' action in bringing and maintaining this suit was not frivolous, unreasonable or without foundation. *Christiansburg Garment Co. v. Equal Opportunity Commission,* 434 U.S. 412 (1978). The Defendant is therefore not entitled to recover its attorneys' fees.

6. Any conclusion of law deemed to be a finding of fact is adopted as such.

Signed and ordered to be entered this 28th day of March, 1980.

/s/ WILLIAM M. STEGER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
For The Eastern District Of Texas
Tyler Division

NO. TY-79-75-CA

Filed March 28, 1980

AARON D. MOSLEY, ET AL

v.

ST. LOUIS SOUTHWESTERN
RAILWAY COMPANY

JUDGMENT

This action came on for rehearing before the Court, Honorable William M. Steger, District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is ORDERED and ADJUDGED that Plaintiffs take nothing, that Plaintiffs' Complaint and Defendant's Counterclaim be dismissed on the merits, and that the Defendant recover of the Plaintiffs its costs of action.

SIGNED this 28th day of March, 1980.

/s/ WILLIAM M. STEGER
United States District Judge

Aaron MOSLEY et al.,
Plaintiffs-Appellants,

v.

ST. LOUIS SOUTHWESTERN RAILWAY,
d/b/a Cotton Belt Route,
Defendant-Appellee.

NO. 80-1447

Summary Calendar.

United States Court of Appeals,
Fifth Circuit.
Unit A

Jan. 22, 1981.

In a civil rights suit for employment discriminaton, plaintiffs alleged that defendant railroad refused to hire them on the basis of their race, and that the test used to screen job applicants had not been validated. The United States District Court for the Eastern District of Texas, at Tyler, William M. Steger, J., dismissed plaintiffs' claims on the ground that plaintiffs had voluntarily and knowingly entered into settlement agreements, and plaintiffs appealed. The Court of Appeals, Sam D. Johnson, Circuit Judge, held that decisions of Equal Employment Opportunty Commission investigator not to honor plaintiff employees' request for an opportunity to discuss proposed settlement with counsel, combined with her efforts to persuade the uncounseled plaintiffs to accept the settlement terms proposed by employer, constituted a denial of access to counsel; and when considered against the background of plaintiffs' limited formal education, and lack

of legal experience and the ambiguous circumstances under which the settlement agreements were signed, this denial operated to vitiate the settlement agreements.

Reversed and remanded.

Appeal from the United States District Court for the Eastern District of Texas.

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

SAM D. JOHNSON, Circuit Judge:

This is an employment discrimination case brought under 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* Plaintiffs allege that the defendant, St. Louis Southern Railway Co., refused to hire plaintiffs on the basis of their race, and that the test used to screen job applicants had not been validated. Prior to trial, the district court conducted a hearing to determine whether negotiated settlement agreements signed by the parties should be upheld. At the conclusion of the hearing, the district court found that plaintiffs had voluntarily and knowingly entered into the agreements. Based upon this finding, the court upheld the agreements and dismissed plaintiffs' Title VII and Section 1981 claims. For reasons that follow, the district court's judgment is reversed, and the case remanded for further proceedings.

Aaron Mosely and Billy J. Butler, black male residents of Smith County, Texas, applied for employment with defendant during April and May of 1978. Both plaintiffs were hired for the position of brakeman-yardman. Defendant hires brakemen-yardmen on a student training basis. As a condition to permanent employment, trainees must

pass an examination at the end of their initial forty-five days of training. The purpose of the exam is to demonstrate the trainees' familiarity with the rules and procedures governing the operation of defendant's equipment. After taking the examination on July 14, 1978, plaintiffs were informed that they failed to achieve a passing score. Plaintiffs subsequently were terminated.

On October 17, 1978, plaintiffs personally appeared at the Dallas district office of the Equal Employment Opportunity Commission (EEOC), and filed formal charges of discrimination against defendant. In essence, the charges complained of discrimination in the administration of the exam.[1] After filing charges plaintiffs retained counsel who notified Celeste Dorsey, the Commission investigator assigned to plaintiffs' case, that his firm would be representing both plaintiffs.

In December 1978, Ms. Dorsey scheduled a fact-finding conference, which both plaintiffs and railroad representatives were required to attend. Plaintiffs appeared with their attorney, who was notified of the conference only shortly before it began. Plaintiffs' attorney introduced himself to Ms. Dorsey. Defendant appeared through its representative. Ms. Dorsey first met approximately two hours with defendant's representative, and after receiving defendant's answers to questions previously propounded by the Commission, asked whether defendant was interested in settling plaintiffs' claims. In response, defendant's representative informed Ms. Dorsey of the terms defendant would be willing to offer. Ms. Dorsey then summoned plaintiff Butler and spoke to him in private.

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1. Plaintiffs alleged that they believed (1) that they passed the exam; (2) that all black trainees failed the exam, whereas all white trainees passed; (3) that their grades otherwise were sufficient; and (4) that their job performance was satisfactory.

Plaintiffs' attorney testified that when Ms. Dorsey entered the corridor to summon Butler, he also stood "assum[ing] that . . . [he would] be going into the room with [Ms.] Dorsey . . . but, instead [Ms.] Dorsey came up and got Mr. Butler and took him into the room . . ." without indicating that plaintiffs' attorney could accompany his client. Tr. 61. Plaintiffs' attorney also testified that although Ms. Dorsey did not prevent him from entering the conference room, she did not give him an opportunity to say anything before summoning Butler, and that subsequently he departed for a previously-scheduled court appearance. Ms. Dorsey, however, testified that when she "went out of the conference room to talk with the [c]harging [p]arties their attorney was gone." Tr. 35. After speaking with Butler, Ms. Dorsey interviewed plaintiff Mosley and then spoke to both of them together. While counsel was still absent, Ms. Dorsey presented the proposed settlement to both plaintiffs. In the absence of their attorney, they signed the agreement, as did defendant's representative.

Under the settlement agreements plaintiffs promised not to institute suit under Title VII based upon their respective charges filed with the Commission. In return, defendant promised to (1) purge plaintiffs' personnel files of any information pertaining to the charges filed before the Commission, (2) refrain from disclosing to any prospective employer any evaluation of plaintiffs other than a neutral statement of the nature and duration of their employment, and (3) allow plaintiffs to reapply for employment and to consider their applications carefully. The settlement agreements did not address plaintiffs' charges of discrimination in the administration of the tests.

When plaintiffs' attorney learned later that day that settlements had been signed in his absence, he protested to the Dallas EEOC office. On behalf of plaintiffs, and with their consent, he also filed new charges, alleging that the test used by defendant to screen trainees had not been validated. The Dallas office dismissed the new charges and issued notices to plaintiffs of their right to sue. Subsequently, plaintiffs filed suit. Based upon the settlement agreements, the district court dismissed plaintiffs' claims. On appeal plaintiffs argue (1) that the agreements were not knowingly and voluntarily executed, and therefore are unenforceable, (2) that the agreements, even if valid, do not preclude plaintiffs' Section 1981 claims, and (3) that the agreements, even if valid, do not preclude the claims filed subsequent to their execution.

In dismissing plaintiffs' complaint, the district court determined that the settlement agreements were signed by plaintiffs both knowingly and voluntarily, and that the absence of plaintiffs' attorney did not constitute a denial of access to counsel. The court based its conclusion upon "the fact that at no time during the [meeting with Ms. Dorsey] did either plaintiff object to the absence of their counsel or ask to be allowed to discuss the proposed settlement with him."

This finding is without support in the record. At the pre-trial hearing, Ms. Dorsey acknowledged that plaintiffs, when presented with the proposed settlement agreements, stated that "they had to have their attorney present to sign the agreement[s]," and that in response, she informed plaintiffs that "they did not have to have their attorney to sign the agreement[s]." Tr. 15. Nothing in the record contradicts this testimony. The record also

demonstrates that plaintiffs, particularly Butler, were reluctant to sign the agreements, but were told that if they wanted the agreements they had to sign at that time, without an opportunity first to confer with counsel, and that their failure to sign would result in the commencement of formal proceedings. Ms. Dorsey also told plaintiffs that the terms offered by defendant were the best she could obtain, and intimated that if plaintiffs elected to sue, they might be held liable for attorneys' fees.[2]

[1] The right to the advice and assistance of retained counsel in civil litigation is implicit in the concept of due process, *Potashnick v. Port City Construction Co.*, 609 F.2d 1101, 1117-19 (5th Cir. 1980), and extends to administrative, as well as courtroom, proceedings. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed. 2d 287 (1970). This right inheres in the very notion of an adversarial system of justice, and is indispensable to the effective protection of individual rights. Inasmuch as a valid settlement or waiver has an effect equal to the entry of a formal judgment, the applicability of these principles to the administrative proceeding in this case cannot be gainsaid.

[2, 3] Access to retained counsel is particularly important when, as in the case *sub judice*, a settlement is negotiated prior to a Commission determination of reasonable cause to believe that a discriminatory practice has

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2. In support of its finding, the district court also noted that plaintiffs suggested changes in the settlement agreements, and that these changes were incorporated into the agreement. Although testimony of plaintiff Butler, elicited by the district court, indicates that plaintiffs may have suggested changes, nothing in the record supports the district court's finding that plaintiffs' suggestions were adopted. Moreover, in contrast to Butler's ambiguous testimony, Ms. Dorsey testified that the changes were suggested not by plaintiffs, but by defendant's representative. Tr. 19.

occurred. When it is necessary to balance the merits of the employee's claim of discrimination and the likelihood of success on that claim against the degree to which a proposed settlement will substantially accomplish the relief sought, it is asking too much to expect an aggrieved employee or applicant to make an intelligent settlement decision without the opportunity first to confer with retained counsel. Indeed, the Commission's regulations and operating guidelines recognize this principle. The EEOC Compliance Manual provides that a "charging party's attorney [should] be contacted prior to contacting [the] charging party with [a] settlement offer." EEOC Compliance Manual, App. to § 82, Item 6.

[4] Moreover, the Commission's regulations recognize that the presence of an EEOC specialist during the settlement process will not obviate a claimant's need for access to retained counsel. Section 1601.20 of the Commission's Procedural Regulations provides that in predetermination settlements Commission officials act as mediators "encourag[ing] the parties to settle the charge on terms that are mutually agreeable." 29 C.F.R. 1601.20.[3] When acting in this capacity, an EEOC specialist cannot reasonably be expected to protect discrimination claimants from improvidently relinquishing their Title VII rights, including the right to assert their claims of discrimination in a federal court.[4]

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3. In an amicus brief filed in support of plaintiff's position, the EEOC reaffirms its commitment to the principles expressed in these regulations. The Commission attributes to inexperience both Ms. Dorsey's failure to present the settlement proposal to plaintiff's attorney, rather than to plaintiffs directly, and her failure to honor plaintiffs' request to confer with counsel before signing the agreements.

4. The circumstances under which plaintiffs signed the settlement agreement in this case illustrates the mischief that can result when a Commission Specialist fails to present the settlement proposal directly

[5-8] The right of access to retained counsel is one of constitutional dimensions and should be freely exercised without impingement. *Potashnick v. Port City Construction Co.*, 609 F.2d at 1118. In the present case, Ms. Dorsey's decision not to honor plaintiffs' request for an opportunity to discuss the proposed settlement with their attorney, combined with her efforts to persuade the uncounseled plaintiffs to accept the settlement terms constitutes a denial of access to counsel. When considered against the background of plaintiffs' limited formal education, their lack of legal experience and the ambiguous circumstances under which the settlement agreements were signed, this denial operates to vitiate the settlement agreements. This Court has refused in the past to "visit the effects of EEOC's erroneous practice[s]" upon employment discrimination claimants, *Crawford v. Western Electric Co., Inc.*, 614 F.2d 1300, 1308 (5th Cir. 1980) *quoting Zambuto v. American Telephone & Telegraph* Co., 544 F.2d 1333, 1336 (5th Cir. 1977), and we refuse to do so in this case. *See also Jones v. Bell Helicopter Co.*, 614 F.2d 1389, 1391 (5th Cir. 1980). Consequently, the district court erred in dismissing plaintiffs' claims.[5]

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to the claimant's attorney. Ms. Dorsey testified that, upon presenting the proposal, she informed plaintiffs that it was "the best that [she] could get for them."—clearly suggesting to plaintiffs that she was acting on their behalf in negotiating the settlement terms. Tr. 34. Ms. Dorsey also testified, however, that she was unconcerned with whether the agreements were fair or unfair, that the settlement process is "professional" and that the "agreement[s] [were] based upon what the charging parties and the respondents agreed to." Tr. 30.

5. We do not hold that employment discrimination claimants unrepresented by counsel are incompetent to enter binding settlement agreements, nor that a settlement agreement may be avoided if a claimant later demonstrates that he or she settled for less than might otherwise have been obtained through litigation. Constitutional, as

[9] This is not a case in which plaintiffs' claims are patently frivolous. Represented by knowledgeable counsel, plaintiffs therefore would not be expected to bargain away their claims for insubstantial relief. Yet, the settlement terms offered by defendant did not even purport to address plaintiffs' claims of employment discrimination; indeed, they amounted to precious little more than a promise of nonretaliation against plaintiffs—a duty dependent not upon any contractual relationship, but arising from the provisions of Title VII. 42 U.S.C. § 2000e-3. When an uncounseled claimant relinquishes a substantial claim for a return promise that fails to address the substance of the employee's claim of discrimination, a court will examine the agreement with the utmost scrutiny. Evidence of overreaching or other improper conduct will require a finding that the settlement was not the product of a knowing and voluntary waiver of the employee's claims.

For the reasons stated above, the district court's dismissal of plaintiffs' claims is reversed, and the case remanded for further proceedings.[6]

REVERSED AND REMANDED.

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well as statutory, rights are subject to waiver. Courts, however, "indulge every reasonable presumption against waiver." *Aetna Insurance Co. v. Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937). To be effective, a waiver "not only must be voluntary but must be knowing, intelligent [and] done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. Maryland*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed. 747 (1970).

6. Because of our holding that the denial of plaintiffs' access to counsel vitiated the settlement agreements, we do not address plaintiffs' arguments that the agreements, if valid, affect neither their Section 1981 claims nor the claims filed with the EEOC subsequent to the execution of the agreements.

UNITED STATES COURT OF APPEALS
For The Fifth Circuit

NO. 80-1447

Summary Calendar

D. C. Docket No. CA TY 79 75

AARON MOSLEY, ET AL.,
Plaintiffs-Appellants,

v.

ST. LOUIS SOUTHWESTERN RAILWAY
d/b/a COTTON BELT ROUTE,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

Before AINSWORTH, GARZA and SAM D. JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

On CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is

hereby remanded for further proceedings to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that the defendant-appellee pay to the plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

JANUARY 22, 1981

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
For The Fifth Circuit

Unit A

NO. 80-1447

Filed Feb. 24, 1981

AARON MOSLEY, ET AL.,
Plaintiffs-Appellants,

v.

ST. LOUIS SOUTHWESTERN RAILWAY,
d/b/a Cotton Belt Route,
Defendant-Appellee.

Appeal from the United States District Court for the
Eastern District of Texas

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

(Opinion January 22, 1981, 5 Cir., 198__, __F.2d__).

(FEBRUARY 24, 1981)

Before AINSWORTH, GARZA and SAM D. JOHNSON,
Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal

Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981) the suggestion for Rehearing En Banc is also DENIED.

( ) A member of this Administrative Unit in active service having requested a poll on the reconsideration in this cause en banc, and a majority of the judges in active service of said unit not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ SAM D. JOHNSON
United States Circuit Judge

Office-Supreme Court, U.S.
FILED
MAY 7 1981
ALEXANDER L. STEVAS,
CLERK

NO. 80-1697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
Petitioner,

v.

AARON D. MOSLEY, BILLY J. BUTLER
Respondents.

RESPONSE AND MOTION TO AFFIRM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NO._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY
Petitioner,

v.

AARON D. MOSLEY, BILLY J. BUTLER
Respondents.

RESPONSE AND MOTION TO AFFIRM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents pray that the judgment entered by the United States Court of Appeals for the Fifth Circuit on January 23, 1981 be affirmed, or alternatively that the application for writ of certiorari be denied.

OPINIONS BELOW

The opinion and judgment of the trial court appears in the Appendix of Petitioner's brief at pages A-1 – A-13. The decision of the United States Court of Appeals for the Fifth Circuit is reported at 634 F. 2d 942.

JURISDICTION

This response to the application for certiorari has been timely filed.

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

United States Constitution, Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> No person . . . shall . . . be deprived of life, liberty, or property without due process of law. . .

Administrative Procedure Act, 5 USC §555

> (b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative.

EEOC Procedural Regulations, 29 CFR §1601.19

> (c) Where the person claiming to be aggrieved fails to provide requested necessary information, fails or refuses to appear or to be available for interviews or conferences as necessary, fails or refuses to provide information requested by the Commission pursuant to §1601.15 (b), or otherwise refuses to cooperate to the extent that the Commission is unable to resolve the charge, and after due notice, the charging party has had 30 days in which to respond, the Commission may dismiss the charge.
>
> (e) Where a respondent has made a settlement offer described in §1601.20 which is in writing and specific in its terms, the Commission may dismiss the charge if the person claiming to be aggrieved refuses to accept the offer: Provided, That the offer would afford full relief for the harm alleged by the person claiming to be aggrieved and

the person claiming to be aggrieved fails to accept such an offer within 30 days after actual notice of the offer.

EEOC Procedural Regulations, 29 CFR §1601.20

(a) Prior to the issuance of a determination as to reasonable cause the Commission may encourage the parties to settle the charge on terms that are mutually agreeable. District Directors, Area Directors, the Director of the Office of Field Services and the Director of the Office of Systemic Programs, or their designees, shall have the authority to sign any settlement agreement which is agreeable to both parties. The Commission shall limit its undertaking in such settlements to an agreement not to process that charge further. Such settlements shall note that the Commission has made no judgment on the merits of the charge. Such an agreement shall not affect the processing of any other charge, including, but not limited to, a Commissioner charge or a charge, the allegations of which are like or related to the individual allegations settled.

EEOC Compliance Manual §82:

(a) General Provisions – Ordinarily, Commission employees should begin to involve charging party's and respondent's attorney once the fact of representation is communicated orally, even though the written statement of representation has not yet been received . . . When charging parties or respondents are represented by counsel, Commission employees should *never* approach such charging parties or respondents without advising counsel by letter or by telephone of the contact as explained below. . .

EEOC Compliance Manual Appendix A to Section 82

6. *Negotiated Settlements* – charging parties' attorney to be contacted prior to contacting charging party with settlement offer.

STATEMENT OF THE CASE

Respondents Aaron Mosley and Billy J. Butler, Black men, were hired by the Petitioner as trainees for the position of Brakeman/Yardman at the Tyler, Texas yard.[1] At the end of a 45-day training period, Respondents and the other trainees were required to take an examination. Respondents were informed that they had failed to pass the examination and were terminated despite their otherwise good work record (Tr. 49). On October 17, 1981, Respondents, without the assistance of counsel, filed formal charges of discrimination in the Dallas Office of the Equal Employment Opportunity Commission (EEOC)[2] (Tr. 72). At all relevant times, the Dallas office was a "test" or "target" office for the EEOC's new rapid-charge processing system (Tr. 41-46), which was implemented in Dallas, Chicago, and Baltimore in partial response to the EEOC backlog.

An EEOC employee, Ms. Celeste Dorsey, notified Respondents of the convening of a fact-finding conference in November, 1978 (Tr. 39). Respondents appeared with counsel. Neither the EEOC representative nor the Petitioner appeared. Respondent's counsel phoned Ms. Dorsey who informed him that she had cancelled the conference because of lack of information (Tr. 8, 39). They discussed resetting the conference and counsel for Respondents informed Ms. Dorsey of his representation of the charging parties (Tr. 40).

Without notice to Respondents' counsel, the conference was re-scheduled for December 5, 1980 (Tr. 40). Respondents notified their counsel at 10:00 a.m. on the morning of December

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1. The summary of facts is taken from the Findings of Fact and Conclusions of Law made by the District Court (R. 3-13), except when the trial court failed to make a finding and the testimony is uncontroverted. R indicates Record, Tr indicates transcript of the December 5, 1980 hearing.

2. Each respondent's charge alleged four specific instances of discrimination: (1) that he passed the exam; (2) that they were told that all black trainees failed while all caucasion trainees passed; (3) that his classroom grades were otherwise sufficient; and (4) that his job performance was good.

5 of the conference (Tr. 59). Although counsel had a prior judicial commitment at 1:30 p.m. that same day (Tr. 59) he and Respondents appeared between 10:00 and 10:30 a.m. (Tr. 11, 59). Respondents' counsel introduced himself to Ms. Dorsey (Tr. 11, 60). For the first two and one half hours, specialist Dorsey privately reviewed information with a representative of Petitioner (Tr. 11-12, 35). After the Commission specialist had determined that the Petitioner was willing to settle the charges, she went back into the hallway to bring Respondent Butler into the room to discuss the settlement offer. Ms. Dorsey testified that Respondents' counsel was not present, (Tr. 14) but both Respondent Butler and his counsel testified that the attorney was still in the hallway (Tr. 60, 73). The Court did not make a finding on the disputed testimony but found that Ms. Dorsey was unaware of counsel's continued availability.

Ms. Dorsey discussed the proposed settlement with Respondents individually and together. According to her testimony she told them that the settlement offer was the most she could get from the Petitioner, that it was "the best [she] could get for them." (Tr. 34). When they indicated they were uncomfortable about signing and asked about meeting with their attorney, the EEOC representative told them their attorney did not need to be there for them to sign, but that if they didn't sign the agreement, then the fact-finding conference would be re-scheduled. (Tr. 12, 15, 52). She told them that "there had been a case where a charging party was charged attorney's fees" and that under the right to sue they could hire an attorney if they so desired after the commission had issued a determination (Tr. 52, 53). As a result, Respondent Butler thought that it was "a hopeless case" and that "there was very little that could be done" (Tr. 74).

The actual fact-finding conference never began (Tr. 51). While counsel was still absent, Respondents signed the agreement, between 3:00 and 3:30 p.m. (Tr. 51). The EEOC specialist never reviewed the merits of the case (Tr. 35, 36). She did not know,

therefore, if the test which was administered to Respondents had been validated or had a disparate impact on Black applicants and trainees (Tr. 37-38).

Immediately following the conference, Respondents conferred with counsel. On December 6, 1978, Respondents executed and filed a second charge of discrimination against Petitioner (Tr. 55, 57). In addition to the original charges, Respondents complained that the non-validated tests had a racially discriminatory impact on them and other black employees.

On December 6, 1978, the Deputy Director of the EEOC's Dallas Office formally approved the "agreements" executed on December 5, 1978 (Tr. 22, 23). On December 15, 1978, the EEOC issued Respondents' Notice of Right To Sue (Tr. 55, 57). Respondents filed this action on March 1, 1979, pursuant to the Act and 42 U.S.C. §1981, Civil Rights Act of 1866. Therein Respondents complained about the allegedly racially discriminatory testing, discharge, promotion, and job placement practices and policies of the company and challenged their discharge.

A hearing was held on February 15, 1980, to determine whether the negotiated settlement constituted a bar to suit.[3] The Court found that the execution of the settlement agreement was done "knowingly and voluntarily".[4]

The Court made oral findings of fact and conclusions of law (Tr. 82). He later adopted defendant's proposed findings and conclusions, (R 3-11) and Judgment (R 2).

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3. The Petitioner proceeded at the hearing on its Motion for Summary Judgment, filed pursuant to Rule 56 of the F.R.C.P. The Court's Findings of Facts and Conclusions of Law, however, recited that the hearing was also conducted under Rule 42 (b).

4. Respondents on appeal challenged this ultimate finding by the District Court and the subsidiary findings upon which this conclusion was based (Appellant's Brief at 23-28).

ARGUMENT

I. The right to access to retained counsel in EEOC negotiated settlement proceedings is protected by implication under the due process clause of the Fifth Amendment.

The decision below is in accord with this Court's decisions defining the applicability of due process requirements to administrative proceedings. In *Goldberg v. Kelly*, 397 U.S. 254 (1970) this Court held that procedural due process requires that a pretermination evidentiary hearing be conducted when an agency discontinues public assistance payments to welfare recipients. Further this Court emphasized the importance of the right to counsel stating that "the right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 397 U.S. 270. Thus, in the context of adjudicative administrative proceedings, the right to retained counsel is established.

In *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), this Court noted:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where government action seriously injures an individual, and the reasonableness of the action depends on fact-findings, the evidence used to prove the government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of individuals whose memory may be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment. . .This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases... but also in all types of cases where administrative and regulatory actions were under scrutiny.

regulatory actions were under scrutiny.

Petitioner argues that a constitutional right to counsel has not been implicated herein because the EEOC fact-finding proceedings are investigatory, not adjudicatory. In fact, if Respondents were challenging simply the EEOC fact-finding procedures[5], then Respondents would agree that Fifth Amendment rights are not implicated, as those are purely investigatory proceedings.

However, Respondents suggest that the EEOC negotiated-settlement procedures, as opposed to the fact-finding processes, do implicate Fifth Amendment rights. Support for this proposition may be found in the authorities relied upon by petitioner. In *Hannah v. Larche*, 363 U.S. 420 (1960), Justice Warren, writing the majority opinion stated:

> As is apparent from this brief sketch of the statutory duties imposed upon the Commission, its function is purely investigative and fact-finding. It does not adjudicate. It does not hold trials or determine anyone's civil or criminal liability. It does not issue orders. Nor does it indict, punish, or impose any legal sanctions. It does not make determinations depriving anyone of his life, liberty, or property. In short, the Commission does not and cannot take any affirmative action which will affect an individual's legal rights. The only purpose of its existence is to find facts which may subsequently be used as the bases for legislative or executive action.
>
> 363 U.S. 440-441.

Although the negotiated settlement process does not involve a formal adjudication, the process, if successful, affects the com-

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5. The EEOC guidelines preclude counsel from participating in the fact-finding conference except in an advisory capacity. Attorneys are not allowed to cross-examine, speak for parties or take an active role in the conference.

plainant's legal right to redress grievances in Court. The legal right to petition the courts for redress of grievances is a fundamental right. Access to the Courts is protected by the United States Constitution. *See Procunier v. Martinez*, 416 U.S. 396 (1974); *Johnson v. Avery*, 393 U.S. 483 (1967). Moreover even the fact-finding process itself results in determinations of "cause" or "no cause", unlike the process described in *Hannah* which was purely investigatory. Also the EEOC has authority under the 1972 amendments to proceed in federal court itself on charges of discrimination.

Furthermore, the First Amendment protects the right to assemble or associate with counsel for the purpose of redressing grievances in the Courts. *See N.A.A.C.P. v. Button*, 371 U.S. 415, 428-430, 439-440 (1963). *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 7 (1964). Thus, unlike the process described in *Hannah*, the EEOC negotiated-settlement processes do affect the legal rights of the parties.

The right of access to counsel is implicitly protected by the due process clause of the Fifth Amendment. Justice Frankfurter in the concurring opinion in *Hannah* defines due process as follows:

> Whether the scheme satisified those strivings for justice which due process guarantees, must be judged in light of reason drawn from the considerations of fairness that reflect our traditions of legal and political thought, duly related to the public interest Congress sought to meet by this legislation as against the hazards or hardship to the individual that the Commission procedure would entail. 363 U.S. at 487.

Whether the due process clause of the Fifth Amendment protects Respondents' access to retained counsel in EEOC settlement proceedings may be determined then by analyzing the content of applicable procedural regulations, guidelines and law, the public interest involved in vindicating rights protected by Title VII, and the impact of the Commission's procedures upon Respondents.

Both the Administrative Procedure Act, 5 U.S.C. §555(b), and the EEOC Compliance Manual recognize the right of witnesses in administrative proceedings to be represented by retained counsel.[6] The EEOC Compliance Manual provides that "the charging party's attorney [should] be contacted prior to contacting [the] charging party with [a] settlement offer." EEOC Compliance Manual, App. to §82, Item 6.[7]

Therefore, existing administrative regulations, judicial precedents, and internal EEOC guidelines recognize the party's right during administrative processes to access to counsel. Access to counsel in administrative proceedings has been recognized by the Circuit Courts. *See Yiu Fong Cheung v. Immigration & Naturalization Service*, 418 F. 2d 460, 464 (D.C. Cir. 1969); *Chlomas v. U.S. Dept. of Justice*, 516 F. 2d 310, 313-314 (3rd Cir. 1975); *Casteneda-Delgado v. Immigration & Naturalization Service*, 525 F. 2d 1295, 1300 (7th Cir. 1975); *Mendez v. Immigration & Naturalization Service*, 563 F. 2d 956 (9th Cir. 1976); *Sartain v. Securities & Exchange Commission*, 601 F. 2d 1366, 1376 (9th Cir. 1979); *Castro-Nuno v. Immigration & Naturalization Service*, 577 F. 2d 577 (9th Cir. 1978). As a general rule, administrative procedures recognize a right to counsel when a person is compelled to appear or is a "party" to a proceeding[8].

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6. Section (b) of the Administrative Procedure Act 5 U.S.C. §555 provides in pertinent part:

> "A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative."

7. Moreover, the manual states:

> "When charging parties or respondents are represented by counsel, Commission employees should *never* approach such charging parties or respondents without advising counsel by letter or by telephone of the contact as explained below. . ."
>
> EEOC Compliance Manual §82(a)

8. *See* Kenneth Culp Davis, *Administrative Law: Cases, Texts, Problems* (1977 ed.) pp. 317-319.

What is the public interest which Congress sought to meet by enactment of Title VII of the Civil Rights Act of 1964? One purpose is to achieve "cooperation and voluntary compliance" through encouraging conciliation to resolve alleged violations of Title VII. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). There is no doubt that the adoption of the negotiated-settlement and fact-finding procedures in the Fall of 1977 has resulted in decreasing a substantial backlog of charges, has expedited the handling of new charges of discrimination and increased the number of conciliations. Adoption of the new procedures, therefore, is consistent with the Congressional policy of encouraging conciliation as "the preferred means" to resolve alleged violations of the Act. *Alexander v. Gardner-Denver Co.*, *supra* at 44.

At stake herein, however, is an equally important public interest in eradicating discrimination and making persons whole for injuries suffered as a result of discrimination. *See, e.g., Albermarle Paper Co. v. Moody,* 422 U.S. 405 (1975). The EEOC, perhaps recognizing the potential for tension between the "preferred means" of conciliation by negotiated settlement, and the public interest in eliminating discriminatory practices and their consequences, promulgated guidelines and regulations protecting the right of both charging parties and employers to retain counsel and be represented by counsel.

The settlement arrived at as a result of the process challenged herein neither eliminates a discriminatory practice nor makes the claimant whole. As Judge Johnson states:

> This is not a case in which plaintiffs' claims are patently frivolous. Represented by knowledgeable counsel, plaintiffs therefore would not be expected to bargain away their claims for insubstantial relief. Yet, the settlement terms offered by defendant did not even purport to address plaintiffs' claims of employment discrimination; indeed, they amounted to precious little more than a promise of non-retaliation against plaintiffs—a duty dependent not upon any contractual relationship, but arising from the provisions of Title VII. 42 U.S.C. §2000e3. (A-22)

Finally, Petitioner contends below in its argument-in-chief that the settlement bars not only a suit on the negotiated charge but also on the §1981 suit and Title VII charge subsequently filed challenging the validity and impact of the test. If Petitioner prevailed in this argument, the legal consequences of the denial of access to counsel would be disastrous for Respondents. Having already been persuaded to sign a "settlement agreement" in which Petitioner promises only what the law requires, Respondents would then be barred from seeking meaningful relief in the courts. Due process is clearly required where a government agency makes a binding determination—or engineers a settlement—which directly affects the legal rights of individuals. *Amos Treat & Co. v. Securities Exchange Commission,* 306 F. 2d 260 (D.C. Cir. 1962); *Menechino v. Oswald,* 430 F. 2d 403 (2nd Cir. 1970), *certiorari denied* 400 U.S. 1023. And due process includes the right of access to the courts. *Amor v. Wainwright,* 604 F. 2d 671, (5th Cir. 1979), *certiorari denied* 100 S. Ct. 1597.

Thus, current notions of fairness as manifested by the Administrative Procedure Act, regulations, Commission guidelines and administrative law decisions support protecting the right of access to counsel in EEOC settlement proceedings. The tension between the public interest in conciliation and the interest in vindication and eradication of unlawful employment practices is best realized by allowing aggrieved parties access to retained counsel. The specific, potential injury to uncounseled complainants outweighs the general societal interest in encouraging conciliation when accomplished at the expense of depriving complainants of meaningful relief.

II. The Court of Appeals correctly determined that the denial of access to counsel vitiated the effect of the settlement agreement.

The trial court concluded not only that the settlement agreement was signed knowingly and voluntarily (A-9), but also that Respondents were not denied access to counsel (A-5). These findings were challenged by Respondents below at pp. 23-28 of their brief.

The district court made subsidiary findings that (1) the EEOC specialist was not aware of the continued presence of counsel in the hallway; (2) counsel made no objection to the investigator's speaking alone with Respondent; and (3) neither Respondent objected to the absence of counsel or asked to be allowed to discuss the proposed settlement with counsel. Respondents submit that whether the specialist in fact was aware of counsel's presence is irrelevant in light of her affirmative duty under the EEOC guidelines to notify counsel "prior to contacting the charging party with [a] settlement offer." See E.E.O.C. Compliance Manual, App. to §82, Item 6. Moreover, the specialist failed to notify counsel, although she had actual notice of his representation[9] of the December 5th conference.

In connection with the finding that counsel made no objection, the right of assistance of counsel is held by and may only be waived by the person entitled to representation, not by the attorney. *See Faretta v. California,* 422 U.S. 806, 834 (1975). The specialist testified that the Respondents were reluctant about signing and specifically stated that "they had to have their attorney present to sign the agreement[s]." (Tr. 15) The investigator responded that "they did not have to have their attorney to sign the agreement." (Tr. 15)

Thus, the trial court's finding that the Respondents did not object to the absence of counsel is not supported by the record.

As a result of the denial of access to counsel, the settlement was not signed voluntarily and knowingly. Immediately after sign-

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9. The specialist admitted discussing counsel's representation following her cancellation of the fact-finding conference in November. She claimed she did not notify counsel of the December 5, 1978 conference because there was no letter in the file confirming the representation. The Manual, however, specifically provides at §82 (a):

> "Commission employees should begin to involve the charging party's attorney once the fact of representation is communicated orally, even though the written statement has not been received."

Respondents suggest that the specialist was trying to force a settlement.

ing the instruments, Respondents contacted counsel and filed additional charges of discrimination against the company. The EEOC specialist erred in refusing to honor Respondents' request to consult with their retained counsel (Tr. 19). By representing to the Respondents that the settlement was the best she could get for them and by implication threatening Respondents with an obligation to pay attorney's fees should they not prevail, the EEOC "forced" a settlement which was neither knowing nor voluntary.

Thus, an affirmance in this case would not open the court house doors to a flood of litigation. At Footnote 5 of Judge Sam Johnson's opinion, therein the Court specifically limited the holding to the instant dispute:

> We do not hold that employment discrimination claimants unrepresented by counsel are incompetent to enter binding settlement agreements, nor that a settlement agreement may be avoided if a claimant later demonstrates that he or she settled for less than might otherwise have been obtained through litigation (A-21).

CONCLUSION

For these reasons, Respondents request this Court to affirm the judgment of the United States Court of Appeals for the Fifth Circuit or, alternatively, to deny the application for writ or certiorari.

Respectfully submitted,

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